A

Mas Haini bt Mohd Zaini v Public Prosecutor

B HIGH COURT (BUTTERWORTH) — CRIMINAL APPEAL NO PB-41S-1–02 OF 2021
AMIRUDIN ABD RAHMAN JC
31 JANUARY 2022

C *Evidence — Circumstantial evidence — Securing conviction on — Magistrate's court found child minder ('accused') guilty of causing finger pinch bruises on child and sentenced her to a year's jail and fine — Expert medical evidence showed 17 fresh bruises on child were made within 48 hours before the child was examined by the expert — Whether that time-frame included a weekend when the child was in* D *his parents' care — Whether accused's conduct in reporting the bruises to the child's mother and sending her WhatsApp pictures of the same within three hours of the child being left in her care was consistent with accused's innocence rather than her guilt — Whether testimonies of child's parents who insisted there were no bruises at all on the child's body prior to his being sent to accused's house raised doubts about* E *the truthfulness of their testimonies as two older bruises on the child were clearly visible to the naked eye — Whether the purely circumstantial evidence on which accused was convicted did not irresistibly point to her guilt — Whether prosecution had failed to prove its case beyond reasonable doubt*

F The appellant was sentenced by a magistrate's court to a year's jail and fined RM2,000, in default five months' jail, after being found guilty of voluntarily causing hurt to a ten month old boy ('Ayden'). The charge, under s 323 of the Penal Code, said that Ayden had finger pinch bruises over his chest and abdomen and that those injuries were caused in the 'ruang tamu' of a house at G about 9.30am on 20 August 2018. Ayden was the child of SP2 and her husband, SP3, who lived five houses away from the appellant's. At the appellant's trial, SP2 testified that about 7am on 20 August 2018 she and SP3 left Ayden with the appellant, who was a child minder, before going off to work. About 10.15am, SP2 said she received a WhatsApp message from the H appellant containing pictures of Ayden having marks all over his body. SP2 returned to the appellant's house, picked up the appellant and Ayden and they went to a clinic. The doctor at the clinic suggested that Ayden be taken to the hospital. At the hospital, Ayden was examined by a few doctors including a paediatrician and a forensic pathologist ('SP9'). SP9 testified that Ayden had a I total of 19 pinch bruise marks all over his body, 17 of which had been caused within the span of about 48 hours prior to his examination while the other two bruises — on the boy's right cheek and back — had been caused about ten to 14 days prior to his examination. SP9 testified that all the bruises were of the same pattern and were deliberately caused most probably by an adult and were

not injuries that were self-inflicted or caused by a disease. Besides SP9, three other doctors from the same hospital who had also examined Ayden testified at the trial and they substantially corroborated SP9's testimony. Since it appeared to be a case of child abuse, the police got involved and SP2 lodged a police report regarding the incident. In their testimonies, SP2 and SP3 were adamant that there were no bruise marks at all on Ayden's body prior to the time they sent him to the appellant's house on the morning of 20 August 2018. At the close of the prosecution's case, the magistrate called for the appellant's defence. The appellant said that after Ayden was dropped off at her house on the morning in question, the child slept till about 10am at which time the appellant made preparations to bathe him. As she was removing Ayden's clothing she saw the multiple bruises on his chest and stomach area and immediately called SP2 to inform her about it. At the close of the defence's case, the magistrate came to the conclusion that the bruises to Ayden's body could only have been caused by the appellant and convicted her and imposed the maximum punishment allowed under s 323 of the Penal Code. The appellant appealed against the conviction and sentence on the grounds that: (a) the purely circumstantial evidence upon which she was convicted did not irresistibly point to her guilt; (b) the opinion evidence of the medical doctors contradicted the prosecution's case; and (c) the child's parents were not credible witnesses.

Held, allowing the appeal, setting aside the conviction and sentence and acquitting and discharging the appellant:

(1) To convict an accused based solely on circumstantial evidence, the prosecution had to show beyond reasonable doubt that the accused was the only person who could have committed the crime. If the case was based entirely on suspicion, it would ultimately lead to an acquittal (see paras 24 & 56).

(2) It was not disputed that Ayden was in the appellant's care from about 7am till about 10.40am on 20 August 2018 and that the previous day was a weekend when Ayden was in his parents' care. In her grounds of judgment, although the magistrate acknowledged that the 48-hour period before Ayden was examined by SP9 would have included the time when Ayden was in his parents' care, the magistrate nevertheless called for the appellant's defence taking the view that the appellant bore a burden to explain how the injuries came to be on the child (see paras 27 & 30).

(3) SP9 had examined Ayden on 21 August 2018 at around 9.05am, which was slightly less than 24 hours after the offence as per the charge was allegedly committed. Based on the time-frame given by SP9 — ie, 'approximately 48 hours more or less' prior to his examination — the 17 'new' bruises could have been caused on the morning of 19 August 2018. On that day, the child was never in the appellant's care but was with his

parents. SP9's opinion evidence on the 17 bruises, therefore, exculpated the appellant. This itself caused the prosecution's case to collapse as it rested on SP9's expert opinion (see paras 31–33 & 35).

(4) Both SP2 and SP3 testified that there were no bruise marks or injuries at all on Ayden's body prior to the boy being sent to the appellant on the morning in question. This assertion by the parents contradicted the medical evidence. Putting aside the 17 newer bruises, there were two older ones (about ten to 14 days' old) on Ayden's body — one on his back and the other on his right cheek — which were also non-accidental injuries that had the same pattern as the other 17 bruises. These two older bruises were clearly visible to the unaided eye. The bruise on the right cheek, especially, was prominent enough not to go unnoticed. Yet, the parents insisted that there were no bruise marks at all on the child's body before he was sent to the appellant on the morning in question. While it was true that the charge against the appellant was not concerned with the older injuries, in totality it affected the credibility of Ayden's parents and raised doubts about the truthfulness and veracity of their testimonies at the trial (see paras 40–43 & 45).

(5) It was not disputed that the appellant contacted SP2 about the bruise marks on Ayden's body (and sent her WhatsApp pictures of the same) at about 10.15am, which was roughly less than an hour after the time of the alleged offence as stated in the charge. This conduct was consistent with the appellant's innocence rather than guilt. If the appellant had caused the bruises intentionally, would she have called the child's mother immediately or sent a photograph of the bruises to the mother? The appellant could have made up a story to conceal the fact if she had caused the bruises. Her explanation that she discovered the bruises when she was preparing to give Ayden a bath was one that might reasonably be true, looking at the totality of the evidence, especially the evidence of SP9. As the case was based solely on circumstantial evidence, the fact that the appellant had acted in a way that was consistent with her innocence was something that favoured her defence (see paras 47–49).

(6) The charge against the appellant stated that the offence was committed in the 'ruang tamu rumah bernombor 1380 ...' and also that it took place at around 9.30am although there was no evidence to show exactly where and when the offence allegedly took place. Given that the case was based entirely on circumstantial evidence and there were no witnesses who could categorically say where and when the offence allegedly took place, this court failed to see why the prosecution drafted and left the charge in such a manner during the trial. A charge should be drafted with the evidence available and be amended if needed in accordance with the evidence presented during the trial (see paras 52–55).

[Bahasa Malaysia summary

Perayu telah dijatuhkan hukuman penjara setahun oleh mahkamah majistret dan didenda RM2,000, penjara lima bulan, selepas didapati bersalah dengan sengajanya menyebabkan kecederaan kepada seorang kanak-kanak lelaki berusia sepuluh bulan ('Ayden'). Pertuduhan di bawah s 323 Kanun Keseksaan tersebut menyatakan bahawa Ayden mempunyai kesan lebam di bahagian dada dan perutnya dan kecederaan tersebut disebabkan di ruang tamu sebuah rumah kira-kira pukul 9.30 pagi pada 20 Ogos 2018. Ayden adalah anak SP2 dan suaminya, SP3, yang tinggal jarak lima rumah dari perayu. Di dalam perbicaraan perayu, SP2 memberi keterangan bahawa kira-kira jam 7 pagi pada 20 Ogos 2018 dia dan SP3 meninggalkan Ayden dengan perayu, yang merupakan seorang penjaga kanak-kanak sebelum pergi bekerja. Kira-kira jam 10.15 pagi, SP2 berkata dia menerima mesej WhatsApp daripada perayu yang menunjukkan gambar Ayden yang mempunyai tanda di seluruh tubuhnya. SP2 kembali ke rumah perayu mengambil perayu dan Ayden dan mereka pergi ke klinik. Doktor di klinik mencadangkan agar Ayden dibawa ke hospital. Di hospital, Ayden diperiksa oleh beberapa doktor termasuk pakar pediatrik dan ahli patologi forensik ('SP9'). SP9 memberi keterangan bahawa Ayden mempunyai sejumlah 19 kesan lebam di seluruh badannya, 17 daripadanya telah disebabkan dalam tempoh kira-kira 48 jam sebelum pemeriksaannya manakala dua lagi lebam — pada pipi kanan dan belakang lelaki itu — telah disebabkan kira-kira sepuluh hingga 14 hari sebelum pemeriksaannya. SP9 memberi keterangan bahawa semua lebam adalah corak yang sama dan sengaja disebabkan oleh orang dewasa dan bukan kecederaan yang ditimbulkan sendiri atau disebabkan oleh penyakit. Selain SP9, tiga doktor lain dari hospital yang sama yang juga telah memeriksa Ayden memberi keterangan pada perbicaraan dan mereka menyokong kenyataan SP9. Oleh kerana ianya kelihatan seperti kes penderaan kanak-kanak, polis telah terlibat dan SP2 membuat laporan polis mengenai kejadian tersebut. Di dalam keterangan mereka, SP2 dan SP3 menyatakan bahawa tiada kesan lebam sama sekali pada badan Ayden sebelum mereka menghantarnya ke rumah perayu pada pagi 20 Ogos 2018. Pada akhir kes pendakwaan, majistret memerintahkan perayu membela diri. Perayu memberi keterangan bahawa selepas Ayden diletakkan di rumahnya pada pagi berkenaan, kanak-kanak itu tidur sehingga kira-kira 10 pagi di mana perayu membuat persiapan untuk memandikannya. Semasa dia mengeluarkan pakaian Ayden, dia melihat beberapa lebam di bahagian dada dan perutnya dan segera menghubungi SP2 untuk memaklumkannya mengenainya. Pada akhir kes pembelaan, majistret membuat kesimpulan bahawa lebam pada badan Ayden hanya boleh disebabkan oleh perayu dan mensabitkannya dan mengenakan hukuman maksimum yang dibenarkan di bawah s 323 Kanun Keseksaan. Perayu merayu terhadap sabitan dan hukuman atas alasan bahawa: (a) keterangan keadaan semata-mata di mana dia telah disabitkan tidak menunjukkan kesalahannya; (b) keterangan pendapat doktor perubatan bercanggah dengan kes pendakwaan; dan (c) ibu bapa kanak-kanak tersebut

bukanlah saksi-saksi yang boleh dipercayai.

Diputuskan, membenarkan rayuan, mengenepikan sabitan dan hukuman dan melepaskan dan membebaskan perayu:

(1) Untuk mensabitkan tertuduh berdasarkan keterangan keadaan semata-mata, pihak pendakwaan perlu menunjukkan tanpa keraguan yang munasabah bahawa tertuduh adalah satu-satunya orang yang boleh melakukan jenayah tersebut. Sekiranya kes tersebutnya hanya berdasarkan sepenuhnya kepada kecurigaan, tertuduh harus dibebaskan (lihat perenggan 24 & 56).

(2) Adalah tidak dipertikaikan bahawa Ayden berada dalam jagaan perayu dari kira-kira jam 7 pagi hingga kira-kira 10.40 pagi pada 20 Ogos 2018 dan hari sebelumnya adalah hujung minggu ketika Ayden berada dalam jagaan ibu bapanya. Di dalam alasan penghakimannya, walaupun majistret mengakui bahawa tempoh 48 jam sebelum Ayden diperiksa oleh SP9 akan memasukkan masa ketika Ayden berada dalam jagaan ibu bapanya, majistret bagaimanapun memanggil perayu untuk membela diri berdasarkan fakta bahawa perayu menanggung beban untuk menjelaskan bagaimana kecederaan tersebut berlaku pada kanak-kanak tersebut (lihat perenggan 27 & 30).

(3) SP9 telah memeriksa keadaan Ayden pada 21 Ogos 2018 sekitar jam 9.05 pagi, yang mana sedikit kurang dari 24 jam selepas kesalahan menurut pertuduhan yang didakwa dilakukan. Berdasarkan jangka masa yang diberikan oleh SP9 — iaitu, 'kira-kira 48 jam lebih kurang' sebelum pemeriksaannya — 17 lebam 'baru' mungkin disebabkan pada pagi 19 Ogos 2018. Pada hari itu, kanak-kanak tersebut tidak pernah berada dalam jagaan perayu tetapi bersama ibu bapanya. Oleh itu, bukti pendapat SP9 mengenai 17 lebam membebaskan perayu. Hal ini sendiri menyebabkan kes pendakwaan goyah kerana ianya bergantung pada pendapat pakar SP9 (lihat perenggan 31–33 & 35).

(4) Kedua-dua SP2 dan SP3 memberi keterangan bahawa tiada kesan lebam atau kecederaan sama sekali pada badan Ayden sebelum budak lelaki tersebut dihantar kepada perayu pada pagi berkenaan. Pernyataan oleh ibu bapa ini bercanggah dengan keterangan perubatan. Mengenepikan 17 lebam yang lebih baru, terdapat dua lebam yang lebih lama (kira-kira sepuluh hingga 14 hari) pada badan Ayden — satu di belakangnya dan satu lagi di pipi kanannya — yang juga merupakan kecederaan bukan kemalangan yang mempunyai corak yang sama dengan 17 lebam yang lain. Kedua-dua lebam yang lebih lama ini jelas kelihatan. Lebam di pipi kanan, terutamanya, cukup menonjol untuk tidak disedari. Namun, ibu bapa tersebut menjelaskan bahawa tiada tanda lebam sama sekali pada badan kanak-kanak tersebut sebelum dia dihantar kepada perayu pada pagi tersebut. Walaupun benar bahawa tuduhan terhadap perayu tidak

berkaitan dengan kecederaan yang lebih lama, secara keseluruhannya mempengaruhi kredibiliti ibu bapa Ayden dan menimbulkan keraguan tentang kebenaran kenyataan mereka di dalam perbicaraan tersebut (lihat perenggan 40–43 & 45).

(5) Adalah tidak dipertikaikan bahawa perayu menghubungi SP2 mengenai kesan lebam pada badan Ayden (dan menghantar gambar WhatsAppnya yang sama) kira-kira jam 10.15 pagi, iaitu kira-kira kurang dari satu jam selepas masa kesalahan yang dikatakan seperti yang dinyatakan dalam pertuduhan tersebut. Tingkah laku ini konsisten dengan perayu yang tidak bersalah. Sekiranya perayu telah menyebabkan lebam dengan sengaja, adakah dia akan segera memanggil ibu kanak-kanak tersebut atau menghantar gambar lebam kepada ibunya? Perayu boleh membuat cerita untuk menyembunyikan fakta sekiranya dia telah menyebabkan lebam. Penjelasannya bahawa dia mendapati lebam ketika dia sedang bersiap untuk memberi Ayden mandi adalah salah satu yang mungkin munasabah benar, melihat keseluruhan keterangan terutama bukti SP9. Oleh kerana kes tersebut hanya berdasarkan keterangan keadaan, fakta bahawa perayu telah bertindak dengan cara yang konsisten dengan perlakuan tidak bersalah adalah sesuatu yang memihak kepada pembelaannya (lihat perenggan 47–49).

(6) Pertuduhan terhadap perayu yang menyatakan bahawa kesalahan tersebut dilakukan di 'ruang tamu rumah bernombor 1380 ...' dan juga bahawa ianya berlaku sekitar jam 9.30 pagi walaupun tiada bukti untuk menunjukkan dengan tepat di mana dan bila kesalahan tersebut didakwa berlaku. Memandangkan kes tersebut berdasarkan sepenuhnya pada keterangan keadaan dan tiada saksi yang dapat memberi keterangan bahawa di mana dan dimana kesalahan itu didakwa berlaku, Mahkamah ini gagal melihat mengapa pihak pendakwaan membuat pertuduhan dengan cara sedemikian semasa perbicaraan. Pertuduhan hendaklah didraf dengan keterangan yang ada dan dipinda sekiranya perlu menurut keterangan yang dikemukakan semasa perbicaraan (lihat perenggan 52–55).]

Cases referred to

Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)
Dato' Seri Anwar bin Ibrahim v PP and another appeal [2004] 3 MLJ 405; [2004] 3 CLJ 737, FC (refd)
Gambhir v State of Maharashtra AIR 1982 SC 1157, SC (refd)
Jitweer Singh a/l Ojagar Singh v PP [2016] 4 MLJ 525, CA (refd)
Karam Singh v PP [1967] 2 MLJ 25; [1967] 1 LNS 65, FC (refd)
Khoon Chye Hin v PP [1961] 1 MLJ 105b, CA (refd)
Loh Chak Wan v PP [1939] 1 MLJ 84; [1937] 1 LNS 35 (refd)
Muniandy & Anor v PP [1973] 1 MLJ 179, FC (refd)
PP v LKI Holidays Leisure Sdn Bhd [1998] 1 MLJ 315, HC (refd)

A *PP v Lee Pak* [1937] MLJ 265; [1937] 1 LNS 48 (refd)
R v HC 2009 ONCA 56, CA (refd)

Legislation referred to

Criminal Procedure Code s 153(1)
B Evidence Act 1950 s 8
Penal Code s 323

Arafas bin Abdul Razak (with Muhaimin bin Hashim) (Arafas & Jannah) for the appellant.
C *Aisyah Al Humairah Kamaruzaman (Deputy Public Prosecutor, Penang State Legal Advisor's Office) for the respondent.*

Amirudin Abd Rahman JC:

D INTRODUCTION

[1] Mas Haini bt Mohd Zaini, the appellant in this present appeal was charged pursuant to s 323 of the Penal Code at the Butterworth Magistrate's Court for voluntarily causing hurt to a child aged ten months old.
E

[2] The charge framed by the prosecution against the appellant in the magistrate's court was as follows:

> Bahawa kamu pada 20hb Ogas 2018 jam lebih kurang 9.30 pagi di ruang tamu
F rumah bernombor 1380 Taman Seri Serdang, Kepala Batas, di dalam Daerah Seberang Perai Utara, di dalam Negeri Pulau Pinang dengan sengaja telah menyebabkan kecederaan ke atas Muhammad Ayden Luth Bin Mohd Idris No KPT 171015-07-XXXX dengan mencubit bahagian dada dan perut menggunakan tangan dan kamu telah melakukan satu kesalahan yang boleh dihukum di bawah
G Seksyen 323 Kanun Keseksaan.

[3] Upon conclusion of the entire trial, the appellant was found guilty and convicted by the magistrate's court and consequently was sentenced to an imprisonment for a period of one year from the date of conviction and a fine of
H RM2,000 (in default five months imprisonment).

[4] Being dissatisfied with the decision of the magistrate's court, the appellant appealed to this court in relation to both her conviction and sentence. The appellant had also sought for a stay of execution pending appeal
I towards the imprisonment imposed, which was eventually granted by the magistrate.

CASE FOR THE PROSECUTION

[5] During the prosecution's case a number of 13 witnesses were called to testify. SP2 who was the mother of the child and also the complainant stated in her testimony that on 20 August 2018 at about 7am she had brought her son who was about ten months old to the appellant's house to be cared for as the appellant was a child carer. SP2 stated that at about 10.15am, she had received a 'WhatsApp' message (exh P2) from the appellant containing pictures of her son having marks all over his body. SP2 after receiving the message had proceeded to go back to the appellant's house and then brought her son to a clinic together with the appellant. SP2 had also stated that when she arrived at the appellant's house, the appellant's husband and their two sons were also present.

[6] The doctor at the clinic referred her son to the hospital and thus SP2 and the appellant as well as the child went to Kepala Batas Hospital for further examination. The child was then examined by the doctors and later the police had arrived to obtain a medical report regarding the examination on her son from the hospital. SP2 stated that she then received a phone call from the police asking her to lodge a police report which SP2 eventually did on the same day as per Kepala Batas Report 6665/18 (exh P3).

[7] SP2 further testified that her son was admitted for a period of two days in Kepala Batas Hospital and was later examined by medical specialists. According to SP2, she was told by the doctors that the marks on her son's body was not that of bruises but instead it was pinch marks. According to her on that night before the incident, only her and her husband were at home as her other children were in Kuala Lumpur.

[8] The medical examination conducted by SP9 who was a Forensic Pathologist in Pulau Pinang Hospital on the said child on 21 August 2018 found that there were multiple bruise marks all over the body of the child. SP9 was of the opinion that most of the bruise marks (which were 17 in total) were caused 'approximately 48 hours more or less' prior to the examination conducted except for two other bruise marks on the right check and back which he was of the view was caused around ten days to 14 days prior to the examination. According to him all the bruises had a similar pattern of a 'typical fingertip bruise blunt object' in shape about 1cm–2cm in diameter of an adult finger. SP9 ruled out the possibility that the bruise marks were self-inflicted by the child or that it was related to a disease. Apart from SP9, another three medical doctors were called by the prosecution to testify which were SP6, SP7 and SP8. SP7 a medical officer in the Paediatrics Ward in Kepala Batas Hospital stated that she had examined the child on 20 August 2018 at about 4pm and found that there were multiple bruises on the body of the child. Her diagnosis

was that the injuries were non-accidental/physical abuse and was also caused by mild eczema over the left preauricular region. According to her the bruise marks of the child were purplish in colour and the bruise marks would turn from red to purple within 24 hours and after that it would turn to grey. SP7 could not determine what had caused the bruises but she was of the opinion that the child had sensitive skin.

[9] Subsequently, SP8 who was paediatrics specialist in Pulau Pinang Hospital testified that she too had examined the said child on 20 August 2018 at about 5pm She too confirmed that there were multiple scattered bruises on the child which were reddish and purplish in colour. She was also of the opinion that the bruises were non-accidental in nature. Later she had referred the child to SP9 for a detailed examination to be conducted.

[10] The father of the child (SP3) was also called to testify where he stated in his testimony that at around 7am on 20 August 2018 he together with SP2 had dropped their child off at the appellant's house before he and his wife headed to work. At around 10am he received a call from SP2 who informed him that the appellant had called and told SP2 there were bruises on the body of their son. SP3 then asked his wife to bring their son to the hospital.

[11] The prosecution had also called SP11, the husband of the appellant who testified that at the time of the incident he was at work and only arrived home at around 10.30am He stated that his wife (the appellant), his two children aged four and two years old as well as his mother (SP13) was at home together with the said child on that very day.

[12] SP13 who was the mother-in-law of the appellant, testified that she was present in the house at the time but she was asleep and therefore was unaware what occurred at that point in time.

CASE FOR THE DEFENCE

[13] The appellant, upon being called to enter into defence testified that on 20 August 2018, she was the caretaker of the child and SP2 had dropped off the child at her house at around 7am. She then stated that the child had slept and she went on with her daily errands of cleaning the house. At about 10am she realised that the child has was awake and went on to prepare a bath for the child. At that point when she removed the child's clothing, she saw multiple marks on the child's chest and stomach. She then proceeded to call her mother (SD3) who lived only five houses away. When SD3 arrived, she told the appellant to contact SP2. The appellant further stated that initially, SP2 refused to fetch her child as SP2 was busy with work and SP2 had asked the appellant

to bring the child to the clinic. The appellant contended that she could not possibly bring the child herself to a clinic as she had no documentation of the child with her.

[14] She testified that later in the afternoon SP2 had arrived at her house where both of them brought the child to a clinic in Kepala Batas. At the clinic, SP2 had told her that the doctor had to refer her to Kepala Batas Hospital. The appellant then stated that later a policewoman had met her and instructed her to go to the police station. At the police station, she alleged that she was beaten and threatened by a policewoman known as 'Kak Rock'. She said she had denied that she had caused any injuries to the child as she was the one who took care of the child ever since he was a newborn. She then said she was coerced into saying she was guilty and then she was brought to the lock-up by 'Kak Rock'.

[15] The defence had also elected to call SD2 who generally testified that she had also sent her child to the appellant to be cared for and never had any complaints about the appellant's care taking of her child.

[16] SD3 who also testified for the defence stated that she had lived five houses away from the appellant. On 20 August 2018 at about 10am she had received a call from the appellant who asked her to come to the appellant's house. Upon arriving SD3 was told by the appellant that when the child awoke from his sleep and when the appellant was removing his clothes, there were marks and bruises present on the body of the said child. SD3 examined the body of the child and saw black marks. SD3 said she had put pressure on the marks to see whether the child was in pain but however according to her the child was rather cheerful and was fine. She then told the appellant to inform SP2. SD3 then left the appellant's home and went back to her own house as she too was taking care of other children. SD3 denied that she was ever contacted by the police during the investigations.

FINDINGS BY THE MAGISTRATE'S COURT

[17] The magistrate was of the opinion that the prosecution's case was entirely based on circumstantial evidence and relied heavily on the evidence of the medical practitioners in particular SP9. According to the learned magistrate, based on the evidence of SP9 bruise marks were caused within a span of 48 hours and the date and time in the charge which was on 20 August 2018 at 9.30am clearly covered the time range when the child was in the care of the appellant.

[18] Since SP2 and SP3 had stated that there were no injuries on the child prior to them sending the child to the appellant, she concluded that the injuries could only be caused by the appellant. She also accepted the evidence of SP9

that the injury could only be caused by an adult and was non-accidental in nature. In regards to the older bruises on the child which were caused ten days to 14 days before the examination of SP9, the magistrate was of the view that the focus of the trial court should only concern the incident in the charge and does not concern the older injuries. In her grounds of judgment, it was stated:

> Mahkamah berpendapat dan menetapkan fokus mahkamah pada kertas pertuduhan di mana pertuduhan yang dinyatakan adalah pada 20 Ogos 2018 jam lebih kurang 9.30. Konteks ini, focus mahkamah adalah pada tarikh 20 Ogos 2018 pada jam lebih kurang 9.30 pagi bagaimanakah mangsa boleh dapat cedera semasa berada di bawah jagaan OKT?

[19] The magistrate ruled that there was a reason to call the appellant to enter into defence as the appellant had to answer how the injuries were present on the child at the time the child was within her care.

[20] On evaluating the defence's case, the magistrate found that the defence of the appellant was entirely an afterthought as the version put forward by the appellant was never put to the prosecution witnesses namely the fact that the appellant had called and sought assistance from SD3. She also found that the evidence of SD2 was irrelevant in the trial and did not offer any support for the appellant's defence.

[21] Upon finding that the prosecution had proved their case beyond reasonable doubt, the magistrate convicted the appellant as per the charge framed and upon hearing the mitigating and aggravating factors sentenced the appellant to the maximum punishment provided under s 323 of the Penal Code which was a term of one year imprisonment to commencing from the date of conviction as well as a fine of RM2,000 (in default five months imprisonment). The grounds of judgment did not deliberate as to why the maximum sentence was inflicted on the appellant.

ISSUES ON APPEAL

[22] There were various issues raised by the appellant during this appeal. However, the predominant issues can be summarised as follows:

(a) the prosecution's case purely rested on circumstantial evidence;

(b) the opinion evidence of the medical doctors was in contradiction of the prosecution's case; and

(c) the child's parents were not credible witnesses.

Circumstantial evidence

[23] It is quite apparent that the evidence presented in this case was in toto based on circumstantial evidence as there was no eyewitness present who testified before the magistrate's court. Since the child was still an infant and understandably could not testify as to what took place, the only other person who was present at the alleged time and place was the appellant herself.

[24] To obtain a conviction in a case based on circumstantial evidence, the prosecution's narrative must point to the conclusion that an accused was the only person who could have committed the crime charged. The Federal Court in *Karam Singh v Public Prosecutor* [1967] 2 MLJ 25; [1967] 1 LNS 65 had ruled that the only hypothesis that the evidence would lead to in cases of circumstantial evidence is the guilt of the accused. It was held:

> In a case where the prosecution relies on circumstantial evidence, such evidence must be inconsistent with any other hypothesis than that of the guilt of the accused.

[25] The medical doctors (SP6, SP7, SP8 and SP9) who testified during the prosecution's case had unanimously agreed that there were bruise marks all over the child's body and it was non-accidental in nature. In simple terms this would mean that it was done on purpose or intentionally. Among the four medical doctors called, SP8 and SP9 were specialist where SP8 was a paediatrician and SP9 was a forensics specialist. SP8 herself agreed that SP9 was more qualified than herself to determine the nature of the bruises and as to the time span it occurred. SP8 made the decision to refer the matter to SP9 to conduct a detailed examination on the child. Therefore, SP9's opinion evidence is something which is quite fundamental to this case as it would assist the court in arriving to a conclusion as to time frame involved.

[26] In regards to this, SP9 testified that he was a forensic pathologist in Pulau Pinang Hospital and on 21 August 2018 at about 9.05am he had conducted a detailed examination on the child on the request of SP8 at Kepala Batas Hospital. SP9 stated that SP8 had sought his assistance namely for the purposes of interpretation of injuries because he was an expert in that very field.

[27] It must be comprehended that with the inability of the child to testify as he is still an infant, it is pivotal in this case to determine the specific time frame that the injury is said to have been caused as it rested on circumstantial evidence. During the trial it was undisputed that the child was in the care of the appellant on 20 August 2018 from about 7am–10.40am From the notes of proceedings, it is also evident that a day preceding the date of the incident was on 19 August 2018 and the child was with SP2 and SP3 as it was a weekend.

[28] SP9 had this to say when he was questioned during examination-in-chief on the time frame of the bruise marks.

DPP: Doktor, sekiranya saya tanya kepada doktor, berdasarkan pemeriksaan doktor, boleh doktor bagi tahu lebih kurang, kecederaan ini duration dia ataupun dia punya tempoh?

SP9: Aging of bruses, we can only get the estimation. So, I with my expreiance I will put this about approximately 48 hours plus minus.

DPP: Doktor can you specific 48 hours for which trauma in the report?

SP9: Except for No. 6 and 19 bukan, the others are all at the same time. All looks more less the same. No. 6 and No. 19 it is alot older, it is already brownish. So maybe 10 days/2 weeks.

[29] During cross-examination SP9 further testified:

COUNSEL: Doktor boleh letak satu anggaran brapa lama No 6 dan No 19 tu?

SP9: Again i would like to emphesize to the court we cannot put a number on a injury. It is a scale a spectrum.

COUNSEL: Anggaran?

SP9: Macam saya cakap No 1 to No 4, No 6 to No 18, as i mentioned the other day the proximately about 48 hours which means it is not to the dot 48 hours clock works, ranging. No 1 to No 5, No 7 to No 18 is a frame range between 48 hours whereas No 6 and No. 19 is already yellow approximately more than a week roughly and once again we cannot say for sure.

COUNSEL: Anggarannya lebih kurang 48 jam untuk No 1 ke No 5 dan No 7 ke No 18, untuk No 6 dan No 19 lebih daripada seminggu?

SP9: Approximately, could be a bit less or could be more.

COUNSEL: Kita kira 48 jam lebih kurang daripada tarikh atau masa bila? Daripada tarikh doktor buat pemeriksaan ka atau daripada masa doktor buat pemeriksaan?

SP9: 48 hours is masa pemeriksaan, maksud saya adalah the color even may persis beyond that, ini adalah satu jangka masa at the time I did my pemeriksaan, any time between infliction of injuries up to 48 hours time frame.

[30] Based on SP9's opinion evidence, the magistrate was of the view that SP9 had given his expert opinion that the bruises on the child (with exception of the other two older bruises) had occurred 'within' 48 hours prior to his examination and even though the period of 48 hours included the time when the child was in the care of SP2 and SP3 apart from the appellant, the magistrate was opinion that the appellant now bore a burden to explain as to how the injuries had occurred and called the appellant to enter into defence. The relevant portion of the magistrate's grounds of judgment is reproduced as below:

[129] Mahkamah mendapati tarikh kejadian adalah pada 20 Ogos 2019 jam lebih kurang 9.30 pagi manakala tarikh pemeriksaan SP9 terhadap mangsa adalah pada 21 Ogos 2019 jam lebih kurang 9.05 pagi (tempoh lebih kurang 24 jam). *SP9 memberikan keterangan bahawa kecederaan berlaku dalam tempoh 48 jam (bila-bila*

masa dalam tempoh tersebut). SP9 tidak dapat memberi *definite* waktu dan hanya boleh memberi anggaran masa kerana masa sesuatu kecederaan itu adalah mustahil untuk dikira dengan tepat. Maka, OKT yang ada bersama mangsa dan mangsa dibawah jagaan OKT dalam tempoh selepas SP2 dan SP3 menghantar mangsa sehingga kecederaan itu ditemui alas badan mangsa. Maka, tidak ada orang lain yang mungkin untuk mencederakan mangsa dalam tempoh tersebut.

[130] SP9 juga telah memberikan keterangan bahawa pattern cedera adalah typical finger tips of adult finger. Beliau juga telah memberikan keterangan bahawa mangsa seorang budak tidak boleh lakukan pada diri sendiri. Mahkamah menerima sepenuhnya keterangan dan report yang dibuat oleh beliau memandangkan seorang Pakar Klinikal Perubatan Forensik. Tempoh lebam yang 48 hours plus minus, jawapan yang diberikan oleh beliau, dan cedera yang dibuat oleh typical finger tips of adult finger yang diklasifikan sebagai *non-accidental injury*, yang ini berlaku semasa mangsa berada di bawah jagaan OKT sahaja. *Mahkamah faham yang 48 hours plus minus, termasuk jam di mana mangsa ada dengan SP2 dan SP3,* namun mahkamah mendapati kecederaan pada mangsa terserlah semasa mangsa ada di bawah jagaan OKT. Maka, mahkamah mendapati OKT mempunyai kewajipan untuk menjawab bagaimanakah kecederaan itu boleh berlaku atas mangsa memandangkan mangsa dibawah jagaan OKT pada masa tersebut. (Emphasis added.)

[31] This court however could not agree with the findings of the magistrate in regards to the 17 newer bruises found on the child. From reading the relevant portions of SP9's testimony he had said that the 17 newer bruises were inflicted on the child around 48 hours prior to his examination. He had stated irrefutably that even though he could not determine the exact time the bruises were made, it was done 'approximately 48 hours, more or less' prior to him examining the child. Any prudent man would understand that this would mean that the bruises were caused around 48 hours prior to the examination. Even though it was not exactly or on the dot 48 hours, it was somewhere around that time frame. SP9 had never said or meant to say that the bruises were caused somewhere 'within' 48 hours prior to examination.

[32] According to the charge, the offence was said to have occurred at 9.30am on 20 August 2018 and SP9 had examined the child on 21 August 2018 at around 9.05am which was slightly less than 24 hours after the alleged offence had took place. Basing this to the time-frame given by SP9 which was 'approximately 48 hours, more or less' the bruises would have been caused on 19 August 2018 in the morning which was a day prior. The child was never in the care of the appellant on 19 August 2018 but instead was with SP2 and SP3.

[33] Thus, the opinion evidence provided by SP9 on the 17 newer bruises had exculpated the appellant as she was not with the child at around this time. I do not think there is any misperception caused by SP9, he was firm that the bruises were caused approximately 48 hours more or less prior to the

examination and never did he once even say that what he meant was 'within 48 hours prior'. SP9 is an expert witness and furthermore is a medical specialist and having given evidence at least ten times in court according to him, would undoubtedly not be confused when he intends to give his expert opinion on a matter moreover if it involves interpretation of injuries which is within his specialities. He was clear that what he meant was 'approximately 48 hours more or less' and he never meant 'within 48 hours'. To say 'approximately 48 hours more or less' can be extended to around 24 hours is something which is illogical and farfetched.

[34] The Court of Appeal's judgment in *Jitweer Singh a/l Ojagar Singh v Public Prosecutor* [2016] 4 MLJ 525 sheds some light on the matter at hand as the Court of Appeal had to determine on the premise of the time of death of the deceased was not consistent with the charge framed as the accused was not present the scene of the incident during the time stipulated in the charge. The Court of Appeal held:

> [83] Even leaving that aside, this finding that the accused was the last person to see the deceased alive suffers from another serious infirmity which appears to have been overlooked all round in the previous proceedings. Now the prosecution's case as stated in the charge is that the alleged murder was committed by the accused on 22 October 2007 between 7am–8.10am. This must necessarily mean that the deceased was alive during the time stated until her death.
>
> [84] However, the pathologist PW5 testified that the time of death of the deceased could be between 24–36 hours before the body was taken to the Sungai Buloh Hospital for the post-mortem. According to the post-mortem report (exh P6), the body of the deceased was brought to the Sungai Buloh Hospital on 22 October 2007 at 11.15pm. By simple deduction, this would mean that the time of death of the deceased was between 11.15am–11.15pm on 21 October 2007.
>
> [85] Even taking into account that the time of death as stated by PW5 is only an estimation and may be inaccurate by a couple of hours, it was an established fact at the trial that the accused was not at the matrimonial home on 21 October 2007. He only arrived at the house on 22 October 2007 at about 6.30 a.m when Khairuddin opened the door for him. So by virtue of PW5's evidence, the deceased had died long before the accused arrived at the matrimonial home.

[35] As the evidence stands, this court agrees with the counsel for the appellant that SP9 had testified that the bruises were caused around or about 48 hours prior to the examination and that evidence led by the prosecution was not within the specified time frame as stated by SP9. This by itself has caused the entire prosecution's case to collapse as it rested on the expert opinion of the forensic specialist SP9.

Credibility of SP2 and SP3

[36] The subsequent issue which is to be addressed is on the credibility of the parents of the child which are SP2 and SP3. Credibility does not only mean whether a witness is speaking the truth but it also encompasses veracity of events that took place. A credible witness evidence will stand firm through a trial and stand well in totality of the evidence presented.

[37] There has not been much development in the dissimilarity between the concept of 'credibility' and 'reliability' of a witness. But to the mind of this court, there exists a difference between the concept of 'credibility' and 'reliability' of a witness even though both of these concepts do overlap. 'Credibility' as explained revolves around speaking the truth and stating facts genuinely and sincerely as they are. However, 'reliability' is the ability of a witness to recall and recount on facts that occurred. A reliable witness is one whose testimony the court is able to rely and hinge upon as they would be accurate. Naturally, a time passes, the ability of a person to preserve a fact and recount a memory would at times be affected but a witness who is able to preserve a memory well is one who can be placed reliance on. A witness may be said to be a credible one as he isn't making up tales and fabricating his testimony but yet can be an unreliable witness if he believes his testimony to be true but could not recall and recount what actually transpired. Nevertheless, a witness who is not credible would always be an unreliable witness as reliance ought not to be placed on his testimony. In essence, 'credibility' involves veracity and 'reliability' involves accuracy but however both of these concepts relate distinctly to the weight of evidence that is accorded.

[38] In the Canadian case of *R v HC* 2009 ONCA 56 the dissimilarities of these two concepts were explained compendiously:

> [41] Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately:
>
> i. observe;
>
> ii. recall; and
>
> iii. recount
>
> events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence: *R v Morrissey* (1995), 1995 CanLII 3498 (ON CA), 22 OR (3d) 514, at 526 (CA).

[39] However, in relation to the evidence of SP2 and SP3 this court is of the view that their testimony mainly involves the issue of credibility rather than reliability, which shall be addressed subsequently. This court is well aware of the principle that an appellate court ought to be slow in interfering matters concerning credibility of a witness as this is very much within the realm of the

trial court, but at the same time if an appellate court is of the view that credibility was wrongly accorded, there is no cogent reason then as to why an appellate court should not interfere in such circumstances. As the Federal Court in *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 ruled:

> The credibility of a witness is primarily a matter for the trial judge. There is a homogeneous concatenation of authority on this principle and we refer to the locus classicus on his aspect in a passage in the judgment of Lord Thankerton in *Watt or Thomas v Thomas* [1947] AC 484 at p 487. The Privy Council said in *Caldeira v Gray* [1936] MLJ 137 at p 138 that the functions of an appellate court, when dealing with a question of fact, and a question of fact in which questions of credibility are involved, are limited in their character and scope, and that in an appeal from a decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, an appellate court must in order to reverse, not merely entertain doubts whether the decision below is right but be convinced that it is wrong.

[40] In regards to SP2's testimony, she had said that there were no bruise marks or injuries on the body of the child prior to sending the child to the appellant. The pertinent parts of her testimony are reproduced in verbatim as below:

> *Examination-in-Chief*
>
> DPP: Bagaimana keadaan anak semasa hantar?
>
> SP2: Selalu dalam keadaan baik.
>
> DPP: Pada hari kejadian?
>
> SP2: Baik.
>
> DPP: Cuba explain apa itu dalam keadaan baik?
>
> SP2: Sebab dalam dia tudur dengan saya pukul 11.30 sebelum hari kejadian saya tukar pampers semua, semua saya dah check malam tu semua ok, so pagi tu saya hantar dalam keadaan yang baik kepada Mas Haini.
>
> DPP: Bila kali terakhir kamu nampak badan anak?
>
> SP2: Pada malam sebelum hari kejadian. 11.30 malam.
>
> DPP: Macam mana keadaan badan?
>
> SP2: Semua baik.
>
> DPP: Ada kesan-kesan seperti sebentar tadi?
>
> SP2: Tak ada.
>
> ...
>
> DPP: Pada pagi hari kejadian, siapa sediakan anak?
>
> SP2: Saya.
>
> DPP: Bagaimana keadaan anak?
>
> SP2: Dalam keadaan baik.

DPP: Ada salin baju?

SP2: Tidak, cuma saya tukar pampers dan tak tengok badan dia.

Cross-examination

Counsel: Kamu tahu ada kesan cubitan sebelum serah kepada okt?

SP2: Tak tahu.

Ulang soalan, sebelum serah anak kepada pengasuh, Puan tahu terdapat kesan lebam cubit?

SP2: Saya tak tahu.

Counsel: Setuju dengan saya ada orang lain cubit anak puan?

SP2: Tak setuju.

Counsel: Boleh jelaskan, memandangkan puan tengok ada kesan lebam?

SP2: Sebelum itu memang tiada kesan cubitan.

[41] SP3 who was the father of the child had also stated that there were no marks present on the child before his son was sent to be taken cared of by the appellant. He stated in his testimony:

Examination-in-chief

DPP: Bagaimana keadaan anak semasa hantar?

SP3: Tak ada apa-apa.

DPP: Maksud?

SP3: Anak dalam keadaan normal, tiada kesan apa pun.

...

DPP: Bila kali terakhir lihat badan mangsa?

SP3: Malam 19.8.2018

DPP: Masa itu tengah buat apa?

SP3: Tengok TV, dia ada kat depan berdiri.

DPP: Dalam pukul berapa?

SP3: 11 lebih macam itu.

DPP: Selepas tengok TV?

SP3: Masuk tidur dengan isteri dan anak sekali.

DPP: Anak tidur dengan siapa?

SP3: Isteri dengan saya, 3 orang di 1 katil.

DPP: Apa-apa pemerhatian pada masa tu?

SP3: Isteri sedang tukar pampers anak.

DPP: Ada sebarang kesan?

SP3: Tidak.

DPP: Ada apa-apa yang luarbiasa?

SP3: Tidak.

Cross-examination

Counsel: Pada malam sebelum kejadian, isteri buka baju anak? Ada nampak tandaan di badan?

SP3: Tidak.

Counsel: Ada kesan lebam atau luka?

SP3: Tidak.

Re-examination

DPP: Tidak setuju bahawa kesan lebam memang ada sebelum dihantar, kenapa?

SP3: Sebab sebelum ini tiada cedera itu.

[42] Despite SP2 and SP3 were persistent towards the fact that there were no bruises or marks at all on the body of the child before the child was sent to the appellant, the fact remains that the medical evidence was in contrast to this. Putting aside the 17 newer bruises on the child, there were two other bruise marks that were present on the body of the child which SP9 estimated to have been caused ten to 14 days prior to the examination. SP9 in his report which was tendered as exh P13 (report of clinical forensic examination) had indicated that bruise No 6 which was on back and bruise No 19 which was located on the right cheek were present at the point of examination and these were older bruises.

[43] These two older bruises were also said to be non-accidental in nature and had the same pattern as the other 17 newer bruises which was a typical fingertip bruise blunt object. These bruises were visible to the unaided eye without the support for any devices. As I have said putting the issue of the other 17 newer bruises aside, why would SP2 and SP3 constantly say that they had looked at the child's condition prior to sending the child to the appellant and that there were sure unhesitatingly there were no bruise marks on the child at all when there surely was?

[44] The magistrate was of the opinion that the focus that must be given by her is only towards the time and place for the offence stated in the charge and no other. In her grounds of judgment, she wrote:

> [128] Mahkamah juga mendapati berikutan keterangan SP9 dan Laporan yang disediakan oleh beliau, ada juga cedera lama atas badan mangsa yang healing. Mahkamah berpendapat dan menetapkan focus mahkamah pada kertas pertuduhan di mana pertuduhan yang dinyatakan adalah pada 20 Ogos 2018 jam lebih kurang 9.30. Konteks ini, focus mahkamah adalah pada tarikh 20 Ogos 2018 pada jam lebih kurang 9.30 pagi bagaimanakah mangsa boleh dapat cedera semasa berada di bawah jagaan OKT?

[45] This court agrees with the notion that the focus of any trial court would undeniably be on the charge and determine whether the elements in the charge has been proven or otherwise. Nonetheless, this court fails to see eye to eye with the magistrate that this issue should just be brushed off entirely as it did not relate to the charge. While it is true that it did not relate to the charge, but in totality it did affect the credibility of SP2 and SP3. SP2 and SP3 were persistent in their answers that there were no bruise marks on the child before the child was sent to the appellant. I do not think the bruise mark on the right cheek of the child was not prominent that it would just go unnoticed all the while. Any person would be aware of a bruise mark especially on the face of their infant child and to say that the child was handed to the appellant without any bruise marks present to me is fallacious. Hence, this court is of the opinion that there exists doubt as to truthfulness and veracity of SP2 and SP3 in their testimony during the trial. In the words of Thomson CJ in *Khoon Chye Hin v Public Prosecutor* [1961] 1 MLJ 105b:

> If a witness demonstrably tells lies on one or two points then it is clear that he is not a reliable witness and as a matter of prudence the rest of his evidence must be scrutinised with great care and indeed with suspicion.

Conduct of the appellant

[46] Another matter which this court would wish to deliberate upon is regarding the conduct of the appellant at the time of the incident. More often than not in criminal cases, the subsequent conduct of an accused which is a relevant fact vide s 8 of the Evidence Act 1950 would be utilised by the prosecution in proving an offence. For example, when an accused flees from a scene or an accused was said to be scared or worried, it would at times provide support for the prosecution. But, in the opinion of this court subsequent conduct is a double-edged sword meaning which even though most of the time in practice it favours the prosecution, the subsequent conduct of an accused might possibly also favour the version of the defence.

[47] In this case, a fact which is undisputed is that the appellant had contacted SP2 at about 10.15am which was roughly less than an hour after the time the offence had occurred as stated in the charge. The appellant had informed the SP2 on the bruise marks on the child's body and asked SP2 to return to her house. SP2 alleged also that the appellant had sent her a message via WhatsApp attaching a picture of the child's body which there were bruises as per exh P2.

[48] To this court, the subsequent conduct of the appellant was consistent with her innocence. If the appellant had really caused the bruises intentionally, would she have called the mother of the child immediately and would she have sent a photograph of the bruises to the mother? Why wouldn't she have made

up some tale of how the bruises marks occurred for example it was caused by another person or another factor if she intended to conceal the fact that she did indeed cause the bruises? Her explanation that the bruise marks were already present at the time she planned to give the child a bath was an explanation that might reasonably be true, looking at the totality of the evidence presented in particular the evidence of SP9. I would say her subsequent conduct was consistent with her innocence. As decided in *Loh Chak Wan v Public Prosecutor* [1939] 1 MLJ 84; [1937] 1 LNS 35 where Thomas CJ ruled that the court must consider whether an explanation of an accused might reasonably be true although not convinced its truth. It was held:

> Now, where the duty of giving an explanation is cast upon a defendant, and an explanation is given, which is consistent with innocence, the court must consider whether it might reasonably be true although not convinced its truth. The learned magistrate does not appear to have given his attention to this matter.

[49] As this was a case based on circumstantial evidence alone, the fact that the appellant had acted in a way consistent with her being innocent is something in favour of the defence. The appellant had not blamed anyone else, did not say that it was caused by other factors or did not even try to conceal the fact and she deliberately and without much delay informed SP2 about the bruise marks. In *Muniandy & Anor v Public Prosecutor* [1973] 1 MLJ 179 the Federal Court's grounds of judgment stated:

> Wherever circumstantial evidence is relied on by the prosecution in building up its case against an accused person, any such piece of evidence must tend only in one direction, that is to say, suggest or lend support to an inference of guilt. This evidence, if capable of an innocent interpretation — or ambiguous, as being equally consistent with guilt or innocence-should never be placed before the jury as circumstantial evidence strengthening the prosecution case. Any summing-up which fails to explain this intelligibly to the jury is a serious misdirection. All the more so, where, in the instant case, circumstantial evidence more consistent with innocence than guilt was represented to the jury as corroboration of the complainant's evidence. *On the other hand, where the circumstantial evidence is seen to be strongly in favour of the defence, a proper trial requires that, in the interests of justice, this fact be brought to the notice of the jury and not passed over as an irrelevant detail.* Had the jury in this case been directed that, from the father's failure to see the clothing where he could not have failed to notice it, they should draw their own conclusions as to whether complainant was telling the truth, there can be little doubt what the verdict would have been. (Emphasis added.)

[50] The Indian case of *Gambhir v State of Maharashtra* AIR 1982 SC 1157 also resolves the issue at hand that when a case is based on circumstantial evidence, evidence led should not only be consistent with the guilt of an accused but should also be inconsistent with the innocence of an accused. The Supreme Court of India ruled:

> The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. *The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.* (Emphasis added.)

The drafting of the charge

[51] Another matter this court wishes to touch upon is the charge drafted by the prosecution in this case. It is a trite principle that one of the most pivotal matters in a criminal trial is a charge. It has been said time and time again that a charge serves as a notice as to what an accused must defend himself against and the what, when and where an accused has committed an offence alleged by the prosecution. For the prosecution's case to succeed it is not solely the elements of the crime that must be fulfilled but the particulars of the charge as well. The prosecution must have evidence to adequately fulfil both the elements and particulars of a charge. Hence, when drafting a charge, it will be based on the evidence that the prosecution has obtained from the investigations conducted. Where there exists an unanticipated circumstance, which changes the particulars of the offence, then the prosecutor ought to amend the charge in accordance to the evidence adduced in court. As decided by Whitley AG CJ in the case of *Public Prosecutor v Lee Pak* [1937] MLJ 265; [1937] 1 LNS 48:

> The charge should show the accused exactly and with particularity the case which he has to meet, and should not leave him guessing as to which of a variety of alternatives he is alleged to have offend against. It is desirable that before the charge is put to the accused the magistrate should satisfy himself as to whether in his opinion it is on the face of it properly framed; and if at the close of the case for the prosecution or indeed at any other stage of the trial it becomes apparent to him from the evidence that the charge should be altered, s 158 of the Criminal Procedure Code gives him the power to alter it or to add to it at any time before judgment, provided always that such alteration or addition is read to the accused.

[52] In the present appeal, the charge framed against the appellant states that the offence was committed by the appellant in '... ruang tamu rumah bernombor 1380 ...'. Nowhere in the records of appeal was there evidence stating that the offence took place specifically in the hall or 'ruang tamu rumah'. This court fails to see why did the prosecution draft and left charge be in such a manner during the trial. The learned OPP drafted the charge specifically pointing to the fact that offence took place in the 'ruang tamu rumah', but there was no evidence to say at such that the incident occurred in the hall. The investigating officer (SP10) had said that the appellant had confessed that it occurred in the hall of the house. As it is known that confessions are only admissible in limited circumstances when matters such as threat, promise, oppression and even custody must first be ruled out after the voir dire trial which was never done so in this case. It is patently wrong to insert

particulars in the charge based on what is said to be 'OKT mengaku' when the confession was clearly inadmissible in law. It was the prosecution's own choice and determination to precisely and surely state 'ruang tamu rumah' in the charge, which there was no necessity for the prosecution to go into such precision.

[53] This was a case based entirely on circumstantial evidence and no witnesses present in court even said that the offence took place specifically in the hall of the said house. In cases based on circumstantial evidence of this nature, it would suffice if the charge stated that the alleged offence took place in the house as there was no evidence that it occurred specifically in the 'ruang tamu'. A charge should be drafted with the evidence available and be amended if needed in accordance with the evidence presented during the trial.

[54] Apart from that, the charge framed by the prosecution states that the offence took place at around 9.30am. This court could not find it anywhere in the notes of evidence or any exhibits tendered during the trial that the alleged offence took place at about that time. As I have said, this is a case which was based on circumstantial evidence and therefore without having any witness who could pin point an exact time, the charge should have been framed within a time span. From the evidence of SP2 as well as SP3, the child was within the care of the appellant somewhat between 7am–10.45am which ought to be proper time frame basing this case on circumstantial evidence. This court fails to see as to why the charge was drafted and left through the entire trial by stating 9.30am. Based on the evidence, the charge should have stated a time frame as it was based on circumstantial evidence and not direct evidence. The judgment of Mohd Hishamudin J in *Public Prosecutor v LKI Holidays Leisure Sdn Bhd* [1998] 1 MLJ 315 is one which must be borne in mind where His Lordship held:

> This observation has been bothering me for quite some time and I think I should take the opportunity here to comment that prosecuting officers should not take the task of drafting charges lightly. The attitude that drafting charges is a mere mechanical task ought to be discarded. Prosecuting officers should take the task seriously. They should be meticulous and at the same time ensure that the provisions of ss 152, 153 and 154 of the Criminal Procedure Code (FMS Cap 6) ('the CPC') are strictly adhered to.

[55] Section 153(1) of the Criminal Procedure Code has provided that a charge shall contain such particulars as to the time and place of the alleged offence and the person. This court fails to understand as to why the charge would specifically state at about 9.30am when this was a case based on circumstantial evidence and no witness by the prosecution could verify the time it took place. In relation to this, the majority decision of the Federal Court in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2004]

3 MLJ 405; [2004] 3 CLJ 737 has highlighted the importance of providing particulars in a charge and was ruled as follows:

> 'The charge shall contain such particulars as to the time ...'. Since it is mandatory to state the 'time' (ie, date or period) when an offence is alleged to have been committed, clearly it is a 'material matter 'and an 'essential part of the alleged offence', to use the words of Atkin J in the exception stated by him, even if that case is applied. *If the law clearly provides that the charge shall contain particulars as to 'time', it follows that such particulars must be proved.* (Emphasis added.)

DECISION ON APPEAL

[56] In essence this court wishes to state that, it is a fundamental principle of criminal law that an accused can only be found guilty once a case is proven beyond reasonable doubt. A case based on circumstantial evidence which is unassailable and compelling enough might lead to a conviction but however when a case is based entirely on suspicion alone, it would ultimately lead to an acquittal.

[57] Hence, upon reading the records of appeal and the written submissions of the parties and hearing the oral submissions by the appellant and respondent, appellate interference is justified. Thus, the appeal is allowed and the conviction and sentence of the Butterworth magistrate's court is set aside. The appellant is therefore acquitted and discharged. The fine of RM2,000 paid by the appellant is to be returned. The bail pending appeal is also to be returned.

Appeal allowed; conviction and sentence set aside; and appellant acquitted and discharged.

Reported by Ashok Kumar